IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 891

MONITOR PATRIOT CO., NORTH AMERICAN NEWSPAPER ALLIANCE, INC., *Petitioners,*

v.

ROSELLE A. ROY, Executrix of the Will of ALPHONSE ROY, *Respondent.*

On Writ of Certiorari to the Supreme Court of New Hampshire

REPLY BRIEF FOR PETITIONERS

The respondent devotes a considerable portion of his brief (Br. 6-14) to an attempt to discredit Scott, upon whom Pearson principally relied for the bootlegger statement, and to show that the bootlegger statement was false.[1] This approach, however, fails to confront the issues in this case.

[1] Respondent's assumption that the jury found the bootlegger statement to be false is unfounded, for the general verdict may just as probably have been grounded on a finding that the statement was not "relevant" to Roy's fitness for office or that it was published without a "justifiable motive." That the instructions to the jury permitted a verdict for the plaintiff on such a finding (A. 366-394) is the basic defect of the judgment.

First, respondent fails to show that Pearson had any reason to believe that he was receiving false information or that Scott was untrustworthy. At best, respondent presents evidence that the bootlegger statement may have been false,[2] but not a falsehood published with malice by Pearson.

Second, even assuming that Pearson was reckless in relying upon Scott for the bootlegger statement, the

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[2] Respondent's attempt to attribute to the petitioners knowledge of Scott's alleged prevarications requires disortions of the record:

To show that petitioners' trial counsel (and therefore, perhaps petitioners as well) had no faith in Scott's credibility, respondent points to an incident, testified to by Scott, concerning receipt of money from Roy for filing as a straw, and observes that counsel did not call Scott to testify to the fact at the Ballot Law Commission hearing. (Br. 9.) The record shows, however, that Scott had not informed counsel of the incident at the time of that hearing. (A. 121-122.)

As evidence of the recklessness of reliance on Scott, respondent asserts (Br. 10) that Scott "told Pearson he had no evidence" to support his story that Roy had arranged the straw candidacy. Respondent's record reference (A. 90) supports the proposition that Scott had no evidence, but neither there nor anywhere else does the record indicate that he ever told Pearson so.

Respondent even attempts to give the lie to Pearson about his reliance on Scott. Respondent says (Br. 12):

> While Pearson said Scott related meeting Roy in a speakeasy (A. 162), Scott recanted on this before the jury (A. 97).

In support of the alleged recantation respondent goes on to describe Scott's testimony about a speakeasy incident at which Roy was not present. (Br. 12.) Whether or not this amounts to a recantation of Scott's story of once having met Roy in a speakeasy (A. 162) depends on whether the same incident was being described, as to which the record is silent. But even if it was the same incident, so that Scott was recanting his story of having met Roy in a speakeasy, nothing in the record can support respondent's assertion that Scott recanted that he had told Pearson the story.

malice of Pearson does not create liability for the petitioners NANA and Monitor Patriot. (See petitioners' Brief p. 34.) Respondent has not shown that NANA and Monitor Patriot published with malice. The fact that there was an indemnity agreement between NANA and Pearson does not alter that requirement. Even absent such an agreement, basic principles of torts could give NANA a claim over against Pearson for libel judgment resulting from Pearson's column. *See* Prosser, Torts §§ 43-48, pp. 258-281 (3rd ed. 1964). The publisher's right to shift liability back to his source has not caused this Court to dispense with the constitutional requirement of malice.

Respondent's legal argument, for the most part,[3] requires no reply. It seems to attribute to petitioners the position that any candidate for public office may be libeled without any recourse. We do not so contend. Our position is that a statement that defames a candidate is necessarily relevant to his fitness for office, and hence, recovery is limited by *New York Times Co.*

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[3] Respondent's analogy (Br. 31-32) to *Belli* v. *Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967), *cert. denied* 393 U.S. 825 (1968), involving the discrete category of "public figures," is fallacious. Whether there are limitations upon the scope of constitutionally protected criticism directed against a "public figure" is a question not before this Court in this case. Distinctions can, however, readily be drawn. The involvement of a public figure, in contrast to one who holds or seeks public office, in matters of public concern is restricted and does not implicate democratic processes. Whether his prior activities or his character are germane to this limited public involvement may depend upon a factual analysis of the nature of that involvement. In contrast, a candidate for elective office commits himself fully to the public arena. Free discussion of his past conduct and of his character, qualified only by the malice rule, is, as we have pointed out, an essential ingredient of a democratic system.

v. *Sullivan,* 376 U.S. 254 (1964) and its progeny, to libels that are made with malice, as that term has been defined by this Court.

CONCLUSION

For the foregoing reasons and the reasons expressed in petitioners' main brief, the judgment of the Supreme Court of New Hampshire should be reversed and remanded to enter judgment for the petitioners.

Respectfully submitted,

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